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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 781

W. G. DUNCAN,
Transferee of San Antonio Driverless Co., Inc.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on March 19, 1949, affirming the decision of the Tax Court of the United States entered on December 23, 1947.

OPINIONS BELOW

The opinion of the Tax Court (R. 38-41) is not reported. The opinion of the Circuit Court of Appeals (R. 87-88) is reported in..... F. (2d).....

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 19, 1949. (R. 89). The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, Judiciary and Judicial procedure and under Supreme Court Rule No. 38, Sec. 5.

QUESTION PRESENTED

The only question presented in this case is whether petitioner's evidence was sufficient to sustain a finding contrary to the Commissioner's determination.

STATUTES INVOLVED

There is no controversy involving the construction or application of any statute.

STATEMENT OF FACTS

The facts, as proved in the Tax Court, (R. 50-81), may be summarized as follows:

The petitioner is an individual with residence in San Antonio, Texas. (R. 34).

The San Antonio Driverless Co., Inc., now dissolved, had its principal office at San Antonio, Texas and filed its income tax, excess profits tax and declared value excess profits tax returns for 1943 with the Collector for the First District of Texas. (R. 34).

In September of 1940, petitioner and Frank Manley formed a partnership known as the Texas Driverless Company for the operation of a driverless automobile business. (R. 34, 35, 51). This patnership operated the

driverless automobile business until March 1, 1943, at which time the petitioner purchased Manley's interest in the partnership. (R. 52, 53, 54). Petitioner operated the driverless automobile business from March 1, 1943, until sometime during 1945, when he discontinued such business. (R. 54).

Due to the fact that petitioner previously had been engaged in a very hazardous business and had several damage suits pending against him, his wife, Manley and another organized the San Antonio Driverless Co., a corporation, in December of 1940. (R. 51). Petitioner's motive in having his wife and others organize the corporation was to have the corporation acquire title to the automobiles used in the partnership business as a possible protection against seizure by his judgment creditors. (R. 51, 65).

After the San Antonio Driverless Co. was incorporated the partnership transferred its automobiles to the corporation but continued to operate the business. (R. 52). The corporation and partnership entered into a written agreement whereby the corporation rented the automobiles to the partnership for two dollars per day for each automobile. (R. 52, 71-76). Said contract further provided that the corporation, in order to secure the rentals therein provided for, should have the right to take the daily revenues, keeping same and accounting to the partnership at the end of each month. (R. 74).

The corporation never operated the driverless automobile business. (R. 52, 53).

All the receipts were deposited in the name of the corporation and all disbursements were made by checks drawn on th corporation's bank account. (R. 56, 59).

Records of all cash receipts and disbursements were kept, but there was no attempt to segregate the corporation

transactions from the partnership transactions on the books. (R. 60, 61, 67).

The corporation filed income tax returns for 1941, 1942 and 1943. The partnership filed a return for 1942, but none for 1941 and 1943. (R. 37). The record does not show whether a partnership return was filed for the year 1940. No partnership return was filed for the year 1943 because in January of 1944 a revenue agent advised that all 1943 income had to be reported by the corporation. (R. 37).

It was stipulated by counsel that the amount of net income as computed by the revenue agent was correct and that the issue in controversy was whether it should be allocated to the partnership or the corporation. (R. 66).

Walter R. Flack, a certified public accountant, prepared a profit and loss statement for the corporation for the year 1943. (R. 68, 69), and respondent's counsel admitted that the correctness of the computation was not in controversy. (R. 70).

The Commissioner of Internal Revenue held that the business was operated by the corporation and the Tax Court held that petitioner's evidence was not sufficient to overcome the presumption of correctness of the Commissioner's determination. (R. 39).

The Circuit Court of Appeals affirmed, holding that taxpayer did not overcome the presumptive correctness of the Commissioner's determination. (R. 87-88).

REASONS WHY WRIT SHOULD BE GRANTED

The petitioner testified that the Driverless automobile business was operated by the Texas Driverless Company, a partnership, from September of 1940 until March 1, 1943, and an individually owned business thereafter. Petitioner's testimony was corroborated both by documen-

tary evidence and the testimony of his attorney. The respondent did not rebut petitioner's evidence.

The holding that petitioner did not overcome the presumptive correctness of the Commissioner's determination is in direct conflict with the holding of the Tenth Circuit Court of Appeals in *Crude Oil Corporaion of America* v. *Commissioner*, 161 F. (2d) 809, in which case the court said:

> "The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced."

Other decisions to the same effect are: *Hemphill Schools* v. *Commissioner*, 132 F. (2d) 961; *Wiget* v. *Becker*, 84 F. (2d) 706; *Lawrence* v. *Commissioner*, 143 F. (2d) 456; *J. M. Perry & Co.* v. *Commissioner*, 120 F. (2d) 123; *E. Albrecht & Son* v. *Landry*, 114 F. (2d) 202; *Andrews* v. *Commissioner*, 135 F. (2d) 314.

The holding in the instant case is also in direct conflict with the Fifth Circuit Court of Appeals' own holding in *Foran* v. *Commissioner*, 165 F. (2d) 705, in which case the court held that the Tax Court committed an error or law in disregarding the testimony of the petitioner.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Fifth Circuit Court of Appeals commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals. Fifth Circuit, had in the case numbered and entitled on its docket No. 12,422, styled W. G. DUNCAN, TRANSFEREE OF SAN ANTONIO DRIVERLESS CO., INC.,

PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments of the Tax Court of the United States and of the United States Circuit Court of Appeals for the Fifth Circuit be reversed with appropriate directions by this Court, and for such further relief as to this Court may seem proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.————

W. G. DUNCAN,
Transferee of San Antonio Driverless Co., Inc.,
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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 38-41) is not reported. The opinion of the Circuit Court of Appeals (R. 87-88) is reported in_____ F. (2d) _____.

JURISDICTION

This has been stated in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

QUESTIONS PRESENTED

The only question presented in this case is whether petitioner's evidence was sufficient to sustain a finding contrary to the Commissioner's determination.

STATUTES INVOLVED

There is no controversy involving the construction or application of any statute.

STATEMENT OF THE CASE

The statement of facts has been set out in the preceding Petition for Writ of Certiorari, on pages 2 to 4, inclusive, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERROR

Both the Tax Court and the Circuit Court of Appeals erred as a matter of law in holding that petitioner's evidence was insufficient to overcome the presumptive correctness of the Commissioner's determination.

ARGUMENT

I

The evidence introduced by petitioner was sufficient to sustain a finding that the driverless automobile business was operated by the Texas Driverless Company.

The petitioner testified that he and one Frank Manley formed a partnership in September of 1940 for the purpose of operating a driverless automobile business, and that the said partnership operated the business until he purchased Manley's interest in the partnership and in the San Antonio Driverless Co., Inc., a corporation, on March 1, 1943. That thereafter he operated the business under the trade name of the Texas Driverless Company. He further testified that the San Antonio Driverless Co., Inc., was organized in December of 1940 for the sole purpose of holding title to the automobiles being used in the business. His testimony was corroborated by invoices and bills, by the testimony of his attorney, and by the lease agreement between the San Antonio Driverless Co., Inc., and

the Texas Driverless Co. to such an extent that the Tax Court found as a fact that there was no change in the method of operating the business after the corporation was formed. (R. 35-36).

The respondent produced no evidence that the corporation operated the business. It is true that the corporation originally reported the income from the 1943 operation of the business after its bookkeeper was told by an internal revenue agent that it had to do so, but that fact does not rebut the positive and unimpeached testimony of petitioner and his attorney that the corporation did not operate the driverless automobile business.

It is respectfully submitted that if the Tax Court had found as a fact that the driverless automobile business was operated by the Texas Driverlss Company, there is nothing in the record that would sustain a reversal by a reviewing court. In other words, the evidence was sufficient to sustain a finding contrary to the Commissioner's determination. This being the case, the presumption of correctness of the Commissioner's determination, being one of law and not of fact, disappeared. In *Crude Oil Corporation of America* v. *Commissioner*, 161 F. (2d) 809, the Court said:

> "The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced."

The Tax Court and the Fifth Circuit Court of Appeals held that petitioner's evidence was insufficient to overcome the presumption of correctness of the Commissioner's determination. Obviously, they fell into the error of assuming that the presumption of correctness of the Commissioner's determination is an inference of fact, whereas it is a presumption of law.

II.

The Tax Court and the Fifth Circuit Court of Appeals erred as a matter of law in disregarding the evidence of petitioner.

Due, perhaps, to the injection in the record of a lot of immaterial matter, such as the failure of the partnership to keep adequate records, etc., the Tax Court and the Circuit Court of Appeals disregarded petitioner's positive, corroborated and unimpeached evidence to the effect that the Texas Driverless Co. and not the San Antonio Driverless Co., Inc., operated the driverless automobile business during the year 1943. In doing so, they erred as a matter of law. *Foran* v. *Commissioner*, 165 F. (2d) 705.

CONCLUSION

It is respectfully submitted that the writ should be granted.

Respectfully submitted,
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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 781

W. G. DUNCAN, TRANSFEREE OF SAN ANTONIO DRIVERLESS CO., INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 33–41) are unreported. The opinion of the Court of Appeals for the Fifth Circuit (R. 86–87) is reported at 173 F. 2d 218.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1949 (R. 87). The petition for a writ of certiorari was filed on May 11, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Did the Tax Court and the Court of Appeals err in concluding that the income for the year 1943, returned by the San Antonio Driverless Company as a corporation, was its income rather than that of the alleged partnership, Texas Driverless Company, for a portion of 1943, and of W. G. Duncan as an individual for the remainder of that year?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from * * * the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

STATEMENT

The facts pertinent to the issue here, as found by the Tax Court (R. 34–37), may be summarized as follows:

W. G. Duncan, the taxpayer, was engaged in the operation of taxicabs in San Antonio. In September, 1940, he became associated with Frank Manley in a business known as the Texas Driverless Company (hereinafter referred to as Texas), a publicly registered name owned by

them. Manley furnished five automobiles and taxpayer thirty-five, which he purchased by giving his notes for the price and making payment from earnings of the business. The automobiles were rented for periods of not less than an hour. Because law suits were pending against him, taxpayer feared that the automobiles would be seized for the satisfaction of judgments and, on the advice of counsel, taxpayer's wife, Manley and another organized the San Antonio Driverless Company, Inc. (hereinafter referred to as San Antonio), as a Texas corporation on December 14, 1940, and title to the automobiles was transferred to it without cash consideration (R. 34–35).

The recited purpose of the corporation was "to conduct a livery and transfer business with auto and horse drawn vehicles, and for the sale of such vehicles." Of its authorized capital stock of $500, 48 percent was reported on its 1941 income tax return as owned by taxpayer, 48 percent by Manley and 2 percent by another. On its 1943 return, the taxpayer and Manley were each declared to hold 2 percent of its stock (R. 35).

Under date of January 2, 1941, San Antonio made a formal contract for lease of its automobiles to Texas described therein as "owned and operated by Frank Manley." The lessee agreed to pay $2 a day for the use of each car,

to keep the vehicles in good repair and to make replacements when necessary (R. 35).

After San Antonio was organized, the business was operated in the same manner as before; the same pads of printed contract forms bearing the name of Texas were used by customers and that name remained listed in the telephone directory and on the neon sign displayed on the leased building which served as business quarters. Bills of goods and services were rendered as before to Texas and the name "Texas Driverless Company" was publicly recorded as owned by San Antonio. The only bank account maintained was carried in the name of San Antonio; all receipts from operation of the business were deposited in that account, and all bills in the business were paid by checks drawn against it (R. 35–36).

Before and after organization of San Antonio, records of the business were kept in a loose-leaf book showing cash receipts and disbursements, and in a ledger which fails to indicate the source of postings to it and does not balance. No attempt was ever made to segregate income and disbursements between the corporation, partnership or individual. No entries ever indicated the payment or receipt of the automobile rental fixed by the contract, or transfer of the automobile titles (R. 36).

On March 1, 1943, taxpayer purchased Manley's "half interest in the Texas Driverless Company and the San Antonio Driverless Com-

pany" for $10,000. On or about December 31, 1943, San Antonio transferred all its assets, subject to certain of its liabilities, to the taxpayer, then sole owner of its capital stock. The net value of these assets was not less than $16,728.15; San Antonio has since had no assets. It was dissolved on January 3, 1944 (R. 36).

San Antonio filed income tax returns for 1941, 1942, and 1943 as a corporation. A partnership return was filed by Texas for 1942 but none was filed for 1941 or 1943. On the corporation return for 1941, income and deductions for the business as a whole were reported. On the corporation return for 1942, "car rentals" of $18,044 and a loss of $4,839 from the sale of cars were reported, leaving a gross income of $13,205, and from this figure $13,205 was deducted as depreciation. On the partnership return for that year, car rental of $18,044 was deducted as an expense. In January, 1944, a revenue agent examined such books as were maintained, and on the basis of his report in which all income from the driverless car business was imputed to San Antonio for 1941 and 1942, San Antonio included all such income in its 1943 return (R. 37).

The Commissioner determined that San Antonio was taxable as a corporation on the profits of the business for 1943 and that Duncan was liable for the taxes as transferee (R. 37).

The Tax Court sustained the Commissioner (R. 41) and the Court of Appeals for the Fifth Circuit affirmed the Tax Court's decision (R. 87).

ARGUMENT

Insofar as any generally applicable substantive tax principle is concerned, the decision below, that the income of the car rental business was taxable to the corporation that conducted it, is in complete harmony with decisions of this Court. *Moline Properties* v. *Commissioner,* 319 U. S. 436; *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422. Taxpayer's only disagreement is based on the factual contention that an alleged partnership, not the corporation, earned the income attributed by the Commissioner to the latter and to taxpayer as transferee. His reason for issuance of the writ is that the Court of Appeals viewed the effect of the presumptive correctness of the Commissioner's determination in a manner in conflict with the view of the Court of Appeals for the Tenth Circuit in *Crude Oil Corp.* v. *Commissioner,* 161 F. 2d 809, and other cases alleged to be similar (Pet. 5).

We think there is no merit in this contention. Although the Court of Appeals did place its decision in part on the failure of taxpayer to carry its burden of proof, it did so in a way entirely consistent with the decided cases. *Welch* v. *Helvering,* 290 U. S. 111, 115; *Lucas* v. *Structural Steel Co.,* 281 U. S. 264, 271; *Commissioner*

v. *Heininger,* 320 U. S. 467, 475. Taxpayer's contention of conflict depends on the erroneous assumption that the trier of fact was required to believe the interested testimony of the taxpayer[1] although inconsistent with the other evidence. See *H. Levine & Bros.* v. *Commissioner,* 101 F. 2d 391 (C. A. 7th); *Keck Inv. Co.* v. *Commissioner,* 77 F. 2d 244, 245 (C. A. 9th), certiorari denied, 296 U. S. 633.

In any event, the decision below was not based solely on taxpayer's failure to overcome the presumption since the court accurately pointed out that the finding of the Tax Court was supported by substantial evidence. This statement of the Court of Appeals is particularly significant in light of the Tax Court's statement (R. 39) that "this determination conforms to reality, and petitioner's evidence tends to support rather than rebut it." Indeed, the record shows that it would be difficult to imagine a finding more fully supported by the record than that put in question here.

The case, then, presents no occasion for issuance of the writ since, admittedly, the only

[1] The contention is in clear conflict with Rule 52 (a), Federal Rules of Civil Procedure, which governs the review of Tax Court decisions by reason of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Section 36. Under this rule the findings of the trier of fact are not to be "set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

question is the correctness of the factual findings concurred in by both courts (Cf. *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 542; *Baumgartner* v. *United States*, 322 U. S. 665) which we think were beyond question correct, and there is no conflict of decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1949.

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